THE STUDY OF ROMAN LAW.

The object of this paper is to suggest the necessity of more general attention being given to the study of Roman law in our institutions for legal education. No apology ought to be required, and yet I feel that I ought to offer one, for bringing up a matter in which the majority of instructors and students take so slight an interest.

It is, I believe, generally conceded that the ever-rising standard of general education and knowledge in the country necessitates a higher standard of professional education among lawyers, if they are to keep pace with the general improvement around them, and retain their old position as leaders of the nation. Our principal law schools have, I think, recognized this, as is shown in the tendency to raise the qualifications for admission, to increase the length of the course leading to the degree, and to establish post-graduate courses in which much attention is directed to the scientific study of law.

Legal education, like every other institution of permanent benefit to society, mounts towards perfection by a process of evolution in which each improvement becomes the stepping stone to, or point of departure for, some further advance in efficiency.

The student of law in the United States is to-day in a more favored position than is the student in any other English-speaking country in the world.

In England, even so far back as the last century, the want of means for acquiring a scientific knowledge of law was keenly felt. Blackstone in the introduction to his commentaries, says, "The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them, in its stead, at the desk of some skillful attorney, in order to initiate them early in all the depths of practice and render them more dextrous in the mechanical part of business. * * * Experience may teach us to foretell that a lawyer thus educated to the bar in subservience

to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at, he must never aspire to form, and seldom expect to comprehend any arguments drawn *a priori* from the spirit of the laws, and the natural foundation of justice."[1]

The hope expressed by Blackstone for a more systematic and scientific mode of legal education in England has hardly been realized, and indeed the practice he objected to *did* become general. Thus, about one hundred years later, in 1871, Markby, in the introduction to his "Elements of Law," writes as follows: "Until very lately the only study of law known in England was that preparation for the actual practice of the profession which was procured by attendance in the chambers of a barrister or pleader. The universities had almost entirely ceased to teach law, and there was nowhere in England any faculty, or body of learned persons, who made it their business to give instruction in law after a systematic method. Nor were there any persons desirous of learning law after that fashion. Forensic skill, skill in the art of drawing up legal documents, and skillfulness in the advice given to clients, were all that was taught, or learned, by a process of initiation very similar to that in which an apprentice learns a handicraft, or a schoolboy learns a game."[2] And about two years ago, at a meeting of leading lawyers to consider the question of legal education, the Lord Chief-Justice deplored the lack of scientific legal instruction and remarked that the law of England had become "a mere nice discrimination between decided cases."

It seems probable that the system by which the English, and later the American, law has grown and developed accounts for the indifference which, until recent times, has been shown to scientific legal education. "Few persons who have not made a special study of the law can have any notion of the wonderfully uneven manner in which its growth has proceeded. Law being made in this country [England] mostly through litigation, the casual exigencies of litigation determine what parts of it shall be filled up and what left incomplete."[3]

1 Introduction to "Commentaries," pp. 31, 32.
2 Introduction to "Elements of Law," p. ix.
3 Sir F. Pollock, "Essays in Jurisprudence and Ethics," p. 67.

Law which has grown up in such a chance way would seem, at first sight, incapable of scientific treatment. There is no science, however much convenience, in opportunism. And if our law had indeed been merely the outcome of a mass of judicial decisions made to fit the individual cases adjudged, it would be a hard task for the scientific investigator to bring order out of such chaos. But, happily, the principles underlying these multitudinous decisions are, after making allowance for local customs and institutions, mainly those which underlie every system of jurisprudence known to the civilized world. Maine, in his "Ancient Law," shows how curious has been the actual process by which our law has been developed by judicial decisions, or case law. "When a group of facts comes before an English Court for adjudication the whole course of the discussion assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. Yet the moment the judgment has been rendered and reported we slide unconsciously or unavowedly into a new language, and a new train of thought. We now admit that the new decision *has* modified the law."[4] Maine explains this curious anomaly by the fact that a belief originally existed that there was somewhere "a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."[5] Whence came this sufficient body of law? "There is some reason to suspect that the judges of the Thirteenth century drew, in secret, freely, though not always wisely, from current compendia of the Roman and Canon laws."[6]

However this may be, our legal system grew generation after generation, expanding to meet the requirements of the people, and perhaps, as time passed on, not fully conscious of the amount of its indebtedness to that Roman jurisprudence to which it always denied authority. Hatred of foreign domination and of foreign manners and customs made the English people doggedly refuse to accept a system of jurisprudence, however refined and however far in advance of their own comparatively rude legal conceptions, because it was introduced to them by the foreign ecclesiastics whom they distrusted and despised.

But the work in private law of the great jurisconsults of Rome in the discovery of the principles that lay back of the law

4 "Ancient Law," p. 30.
5 "Ancient Law," p. 31.
6 "Ancient Law," p. 31.

governing the mutual dealings of men, was of so universal and permanent a character that these principles necessarily found their way, secretly perhaps but not less surely, into the English law. Speaking of the work accomplished by the Roman jurists in this direction, Sohm says, "The problem here (*i. e.*, in working out the principles of a free and equitable law for the mutual dealings of men, such as the legal effect of conditions, the contractual liability for negligence, etc.) was to discover the true nature of the dealings themselves, to trace the *unexpressed and unconscious intention* underlying all such dealings, and, having done so, to put it into words, to clothe it in a form in which definiteness and lucidity should be coupled with a degree of comprehensiveness sufficient to bring out the broad general principle governing, not merely a large number of cases, but positively *all* cases, including those which were peculiar and exceptional. Such a problem touched rather the creation than the application of law. * * * The genius of Roman jurisprudence * * * gave little thought to the abstract conception of law of ownership, or of liability, * * * but with regard to the consequences involved in the abstract conception of ownership or of liability, its natural instinct was never at fault for a single moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of *bona fides* in human dealings, and applied them to individual cases."[7] Primitive Roman law, like that of all other legal systems in their early stage, consisted of outward and ceremonious formalities, the exact observance of which was the only requisite to the validity of the transaction. The intention, the will, the agreement of the minds which really lay back of the transaction and formed the real reason or cause of it, were totally disregarded. From this dry skeleton of formalism the Roman jurists slowly, and with cautious steps, evolved the truth, *i. e.*, that the formalities were nothing, the intention was everything. Let me illustrate this by a short account of the most important of the services rendered by the Romans to the jurisprudence of all nations and times, the evolution of the contract, as described by Maine in the ninth chapter of his "Ancient Law." A contract, as understood by the Romans, was a convention plus an obligation, the latter being the element which made the transaction binding. Now contracts were classified as follows: The Verbal, the Literal, the Real, and the Consensual.

7 "Institutes of Roman Law," pp. 72, 73.

In the Verbal Contract, the oldest of all, when the convention was reached it was necessary to clothe it in a certain "technical phraseology, specially appropriated to the particular occasion." In this contract the stipulation or solemn form of words alone constituted and created the legal obligation. Next, in the Literal Contract, the "formal act by which an obligation was superinduced on the convention, was an entry of the sum due, where it could be specifically ascertained, on the debit side of a ledger." There is some obscurity as to the exact manner in which this contract was created, but it turns on "a point of Roman domestic manners, the systematic character and exceeding regularity of book-keeping in ancient times." But the point to be observed is that in this contract when the entry was made all formalities were dispensed with, and the contract was complete. "This is another step downwards in the history of contract law."

We now come to the Real Contract, which again shows "a great advance in ethical conceptions." When the convention had been for the delivery of a specific thing, the simple delivery of the thing gave rise to the obligation without further formality. In other words, "performance on one side is allowed to impose a legal duty on the other, evidently on ethical grounds. For the first time then, moral considerations appear as an ingredient in contract law."

Lastly, we have the Consensual Contract, in which the "Consensus or mutual assent of the parties is the final and crowning ingredient in the convention, * * * and as soon as the assent of the parties has supplied this ingredient there is *at once* a contract." Thus in this contract the mutual assent has the same effect in causing the obligation to attach to the convention, as has the form of words, the written entry, and the performance on one side in the Verbal, Literal, and Real contracts, respectively.

The Consensual Contracts were limited, being only four in number, viz., Agency, Partnership, Sale, and Letting and Hiring. "But it cannot be doubted that they constituted the stage in the history of contract law from which all modern conceptions of contract took their start. The motion of the will which constitutes agreement was now completely insulated, and became the subject of separate contemplation; forms were entirely eliminated from the notion of contract, and external acts were only regarded as symbols of the internal act of volition." In this connection Sohm observes, "The department of law where

the peculiar genius of the Roman jurists found full scope is the law of obligations, the law of debtor and creditor, the law, in other words, which is most properly concerned with the mutual dealings between man and man; and here again it is more especially the law relating to those contracts where not merely the expressed, but also the unexpressed intention of the parties has to be taken into account. And in regard to this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all time to come, and enunciated the laws which result from its existence. This is a task which will never have to be done over again. And at the same time, they clothed these laws in a form which will remain a model for all future ages."[8] It cannot be doubted, and it is now, indeed, generally acknowledged, that the English law, in its early formative period, owed much to Roman law.

Professor James Hadley, after alluding to the "feeling less favourable than mere indifference, a tinge of jealousy or repugnance" with which may practitioners and professors of the common law have regarded the civil law, shows that the influence of the civil law on the theory and practice of law in English has been felt in many ways and to a very great extent. Thus, through the ecclesiastical courts much of the procedure and principles of the civil law with regard to wills, intestacy and administration, passed into the English system. Through the Court of Chancery, presided over as it was for a long period by an ecclesiastic, the doctrines and methods of the civil law regarding equitable jurisdiction, became a part of the system of English equity. And, lastly, Professor Hadley shows that in commercial and maritime law the English law is largely indebted to the civil law, the reason being that early English private law was almost exclusively a law of real estate, personal property receiving scarcely any attention. Therefore when trade and business relations developed and became more complicated, it became necessary for English judges to find principles to meet the new demands. "In the civil law they found ready to their hand a store of such principles, carefully worked out and copiously illustrated. * * * It is not surprising that the English judges should have adopted them in their decisions, and so incorporated them into the English law."[9] The steadily growing

[8] "Institutes of Roman Law," p. 74.

[9] Hadley's "Introduction to Roman Law," pp. 43-48.

opinion that law is a science and should be studied as such has necessarily done much to remove that "ignorance of Roman law which Englishmen (and I may add Americans) readily confess, and of which they are sometimes not ashamed to boast." [10]

The exclusion from our course of study of a system to which we are so much indebted seems to be explicable only on the ground that we have not entirely passed, in our process of evolution, from the old ideas to the new. A law school, like an army, consists, after all, of its rank and file—that is, of its students—and law schools must provide those courses which find most favor with those who are to attend them.

"Institutions," says Professor E. J. Phelps, in an article on Legal Education in this journal,[11] "must meet the demands of their times, right or wrong, or they will soon cease to be institutions, for the lack of disciples." And I think that the majority of law students would consider, like their English confreres as described by Markby earlier in this article, that "forensic skill, skill in the art of drawing up legal documents, and skillfulness in the advice given to clients" are all that can, or ought to be, learned in a law school course. But still I hope that the time is coming when those who enter our law schools will do so with the intention of *studying* law rather than of *learning* it, of understanding its principles as well as of becoming proficients in its practice. The immense development of law in the United States and the enormous mass of reported decisions issued yearly from its numerous courts, tend, as it seems to me, to render it more necessary for the student to spend much of his period of legal study in becoming acquainted with the principles upon which this ever-growing mass of law is based. To attempt adequately to cover the entire field of practical law in a two or even a three-year's course, seems to be impossible, and it may be, perhaps, in declining to attempt it, that the University Law School may take its next step in advance. The vast and rapid growth of the law tends to the growth of specialties in its various branches, and perhaps it may be the function of the Law School of the not distant future to devote the larger part of its course to a thorough grounding in the principles of law and the cultivation of habits of correct reasoning, the remainder of the course being given to the special branch of law which the student expects to practice. To cite Professor E. J. Phelps again, "The very first and indispensable requisite in

10 "Ancient Law," p. 347.

11 YALE LAW JOURNAL, Vol. I., No. 4, p. 143 (March, 1892).

legal education, without which there can be none that is worthy of the name, is the acquisition of a clear and accurate perception, a complete knowledge, a strong, tenacious grasp of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs. That should be the work of the law school, to the student who is happy enough to enjoy its privileges. If it does that for him, it does quite enough, and all there is time for." [12]

And Markby expresses the same view of the function of the University Law School when he says, "But it is only with the earliest, and what I may call the preliminary portion of a lawyer's education that a University has to deal. * * * The only preparation and grounding which a University is either able, or, I suppose, would be desirous to give, is in law considered as a science; or, at least, if that is not yet possible, in law considered as a collection of principles capable of being systematically arranged, and resting, not on bare authority, but on sound logical deduction." [13]

Much has undoubtedly been done already in our law schools in the direction of teaching of the kind just mentioned, but much more remains yet to be accomplished. Judge Dillon in his Storrs' lectures in 1891 expresses the opinion that the actual course of instruction in our law schools is too intensely practical and technical, and that the course can have and should have a broader scope than it has when the student is confined to the usual text-books written for practicing lawyers, and the designated illustrative cases, since the oral instruction rarely goes beyond this range. He then continues, "To supply this want the civil law, for purposes of comparative jurisprudence and because of its more orderly and scientific arrangements, should, in its great outlines and essential character, be made an element of instruction to a greater extent than it is in our American law schools. Except in this view and in this incidental or subordinate way, I doubt its utility in the short course of legal study to which our law colleges are confined. I have long been of opinion that less than a three-years' course of study ought not to be adopted." [14]

Is not Judge Dillon's criticism a true one? Are we not somewhat in danger, in our anxiety to fit our student for imme-

12 YALE LAW JOURNAL, Vol, I., No. 4, p. 140.

13 "Elements of Law," p. xi.

14 "Lectures on Law and Jurisprudence," p. 86.

diate practice, of losing sight of the importance of a thorough grounding in the principles of the science they expect to apply? Professor Phelps says, in the article cited above, "I would confine, therefore, the business of the law school, were it left to me, chiefly to the groundwork of the law. This I would try to have taught with extreme thoroughness. And I would regard mental discipline, habits of thought and the learning how to think clearly, accurately, and with the confidence that can only come from the consciousness of a sure foundation, as far more important than the premature accumulation of much knowledge."[15] It seems to me that where the period of study is extended from two to three years, more systematic instruction should be given in the science of law. Every student ought to participate in it, and it should no longer be considered an agreeable but by no means necessary part of a student's legal education, a kind of interesting inquiry to be pursued in a leisurely manner by the few whose pocket-books or predilections suggest a post-graduate course as a pleasant addendum to the necessary period of study. And in the study of law as a science the Roman law must, in its "broad outlines and essential character," take a prominent place. Surely, the time has come when we may rise above the prejudices and objections handed down to us from the past, and no longer refuse to avail ourselves of the treasures of legal knowledge to be obtained from the *corpus juris*. Let us not forget that this body of law is the acknowledged foundation of every system of jurisprudence in use in the civilized world, except our own, and that, even in our own, there is much that has been taken, though not acknowledged, from this source. Roman law is no archaic effete system, the mouldy rubbish of a society and a civilization long since worn out, but "the most celebrated system of jurisprudence known to the world," and one which has profoundly influenced not only the legal but the moral and religious ideas of the world in all ages. Moreover, in its bearing on international law, it has furnished the common ground on which nations can equitably adjust their differences.

In its ethical aspect Roman law is the source from which ideas of the profoundest importance to the political and social development of the world have arisen. Both in its legal and ethical aspects its study is of great practical importance to the American lawyer of the future.

The constant flow of immigration into the United States

15 YALE LAW JOURNAL," Vol. I., No. 4, pp. 142, 143.

brings large numbers of citizens of foreign countries whose legal systems are founded on the Roman law. The greater facilities of intercourse enable these strangers to maintain, as they could not in earlier times, their family connections in their native lands. From this intercourse will doubtless arise many matters requiring professional advice, and in giving such advice the American lawyer with some knowledge of Roman law will be in a sounder and more advantageous position.

In its wider aspect, by which I mean its influence on political and social ideas, it will be of even greater value to him in the time to come. For lawyers, unless they fall behind in the general advance in education, must exercise very great influence on the course of national affairs. And it is becoming more and more important, in view of the growing preponderance in public affairs of those who are the possessors of that little knowledge which is proverbially so dangerous, that there should be a body of men in the country acquainted with the origin of many of the prominent ideas of the times, and thereby able to sift the grain of good from the chaff of passion or prejudice, and competent to interpose a barrier of calm, deliberate conviction against the winds of ignorant or emotional theories. It would take me too far into the subject to set forth in detail how the study of Roman law and of works for the full comprehension of which some knowledge of Roman law is necessary not only extends but steadies the mental vision in legal political and social matters. It should not be neccessary to urge this at all, but were the influence of Roman law known there would be no need to urge its study. With the existing excellent organization of American law schools I think that the opportunity for vastly improving our system of legal education and of removing from ourselves a matter of reproach, is very favorable. But some change must come over our ideas on the subject of law school training before this opportunity can be taken advantage of. As long as Roman law is a required study only for the comparatively few who take Master's or Doctor's degrees, the reputation of the school does not suffer much. But I fear that according to our present ideas if Roman law were made a required subject in the undergraduate course the deadly epithet "impractical" would fall on the school, and wither it away. And yet, as it seems to me, there is now the fairest opportunity for the United States to obtain the honor of being the first of the English-speaking nations to teach its law in a manner worthy its importance. In England, as I have shown above, the influence of the

past has hitherto been too powerful to permit any real change in the methods of legal education. But even there the necessity for improvement is recognized, and it is probable that some measures must soon be taken to remedy the existing condition. But before any real improvement can be effected it will be incumbent upon the reformers to organize a law school or law schools in which proper instruction can be given.

In this country the organization is in full force; all that is wanted is to give effect to the process of evolution that has been going on in legal education since the Declaration of Independence. When the United States proclaimed their independence they adopted so much of the common law of England as was consistent with their altered circumstances. They probably adopted also, for the time at least, the English ideas and system of legal education. But the establishment of regular law schools marked a distinct advance on those old ideas, although the past has been sufficiently powerful to impart to the new system some of the prejudices and imperfections of the old. I think, however, that in the not-distant future the legal education provided by our universities will reach its full logical development in offering to students not merely an opportunity to make themselves good legal workmen, but good sound lawyers as well. No institution can continue to exist with benefit to the community without obeying its inherent natural law of development and advancement. I venture to suggest that when law schools were first instituted their founders, however convinced of their utility, hardly foresaw the possibilities opened up by them. So strong are old prejudices that the law school seems at first to have entered into a kind of timid competition with the office of the practicing lawyer, and to have found it sometimes necessary to offer something that was almost an apology for its existence beside the older system. But the times were with it and it prospered, keeping, however, "the office" in mind, its courses of instruction bearing traces of this solicitude.

I do not think I am wrong in regarding the establishment of post-graduate courses as one of the most important steps in the advance of the law school in usefulness and independence. It showed thereby that it recognized the high character and far-reaching importance of the work to which it had set its hand. It indicated thereby that the function of the law school was not complete when it had afforded such instruction as the office might offer, though perhaps more systematically and conveniently arranged. The sources of law, its origin, nature, extent, limi-

tations, and a comparison of different systems of law now came to be recognized as matters important for the student's attention. Here the advance seems to have been arrested for the time, more in appearance, perhaps, than in reality.

The next step will be, I hope and believe, to require every student to take, in his undergraduate course, some at least of the studies now reserved for the post-graduate years. Included in these studies should be Roman law "in," (to repeat Judge Dillon's words) "its great outlines and essential character," and "because of its more orderly and scientific arrangement." The benefit to the student of a course in Roman law as a mere legal study consists in opening out to him the source of many of the legal conceptions he is meeting with in American law, and in spreading before him, in clear, striking manner, the principles upon which these legal conceptions are based.

I know that there is a very strong prejudice against the study of Roman law, but I think that the more it is studied the weaker will the prejudice become. For I feel sure that every American lawyer who has honestly studied Roman law will acknowledge that his acquaintance with it renders him more capable of dealing with the problems and difficulties presented by the jurisprudence of his own country.

W. F. Foster.

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